CX – 28

Dave Erlanson, Sr.
P.O. Box 46
Swan Valley, Idaho 83449

Certified RRR mail# 7015 1660 0001 0101 5235

February 10th 2016

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EPA
ANCHORAGE A00/A

U.S. Environmental Protection Agency
C/O Tara Martich
222 W. 7th Ave. Box #19
Anchorage, AK 99513

Notice of Appeal : Notice of Violation / Request for Information

Dear Ms. Martich,
I have received a Notice of Violation / Request for Information (attached) sent by officer Edward J. Kowalski from your Seattle, Washington region 10 office dated Jan. 22nd 2016. I have good reason to believe that officer Kowalski's notice and request was done in error as a matter of law and fact, for the following reasons:

1) The Notice failed to comport with due process of law.
2) The Notice failed to establish an "addition" of a pollutant.
3) The Notice violates two nationwide federal injunctions restraining the EPA.

The reason why officer Kowalski's notice fails the due process test is because the notice fails to apprise the party, such as the Appellant, of the opportunity to be heard at a meaningful time and meaningful place before penalties can attach or liberties can be infringed upon. *See Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971). See also, Chalkboard Inc. v. Brandt, 902 F.2d 1375 (9th Cir.1990).*

The fact that officer Kowalski's notice failed to establish an "addition" of a pollutant from the outside world undermines any requirements to report by the Appellant. The Clean Water Act (CWA) clearly states the "addition" requirement within the CWA specifically within *33 U.S.C. § 1362(12)* where: "The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any [addition] of any pollutant to navigable waters from any point source…". Also, the CWA reporting requirements only apply to "additions" that are not indigenous to the waterway. See *Froebel v. Meyer, 13 F. Supp.2d 843 (E.D.Wis. 1998)*. It would be physically impossible for Appellant to report CWA "additions" that do not exist. See the *National Pork Producers v. EPA 635 F.3d 738 (5th Cir. 2011)* where the court stated: "…in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance."

On another point, Appellant asserts and believes that "Incidental Fallback" represents a net withdrawal, not an addition of material. Incidental Fallback cannot be a discharge within the meaning of any State or Federal Clean Water Acts (CWA) as the CWA only permits and regulates additions. All gold mining suction dredges, such as Appellant's are designed to withdraw heavy metal (based on their specific gravity) from gravels and soils, it cannot be said that suction dredges add anything within the meaning of the CWA. Quite frankly, suction dredges are reclamation machines that clean the environment. Appellant is aware that the EPA's own website on the subject is outdated:

MEMORANDUM REGULATION OF CERTAIN ACTIVITIES IN LIGHT OF AMERICAN MINING CONGRESS V. CORPS OF ENGINEERS Wetlands US EPA
http://www.epa.gov/cwa-404/memorandum-regulation-certain-activities-light-american-mining-congress-v-corps-engineers
Had EPA's website been more instructive and up to date it may have provided officer Kowalski the guidance if he had taken the time to review the EPA and Army Corp position on the matter at hand and as illustrated below.

Officer Kowalski's notice now disregards two federal and nationwide injunctions restraining his office and others from soliciting information for which he has no regulatory authority. Specifically, in *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1404 (D.C.Cir.1998)*. Commonly known as "Tulloch I". The court explained that: *"[b]ecause incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge"* and questioned *"how there can be an addition of dredged material when there is no addition of material."*
As your office should be aware, this holding stands today and is extended by the *National Association of Homebuilders v. Corps* (D.D.C. 2007) decision invalidating the January 17, 2001, amendments to the Clean Water Act Section 404 regulatory definition of "discharge of dredged material" (referred to as the "Tulloch II" rule). The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) have promulgated a joint final rule to amend this definition by conforming the Corps' and EPA's regulations to the language of the court's opinion by deleting language from the regulation that was invalidated.

It should be noted that in *National Association of Homebuilders, supra* the court advised the Corps: "*As the Corps rewrites its definition of incidental fallback, it should also reconsider its statement that it "regards" the use of mechanized earth-moving equipment as resulting in a discharge of dredged material unless project-specific evidence shows otherwise. That statement, followed by the coy explanation that it "is not intended to shift any burden," 66 Fed.Reg. at 4575, essentially reflects a degree of official recalcitrance that is unworthy of the Corps.*" What the Army Corp and EPA were admonished for in court is exactly what officer Kowalski is presently engaging in, which could easily be construed as contempt of court. The court finished by stating: "*... the Court of Appeals has made clear, and the government has acknowledged, that not all uses of mechanized earth-moving equipment may be regulated. The agencies cannot require "project-specific evidence" from projects over which they have no regulatory authority. Because the Tulloch II rule violates the Clean Water Act, it is invalid. Therefore, plaintiffs' motion for summary judgment will be granted, and the Corps and EPA will be enjoined from enforcing and applying the rule. An appropriate order accompanies this memorandum.*"

For the above stated reasons Appellant strongly recommends that your office withdraw officer Kowalski's notice and request in this matter.

Thank you.
Sincerely,

Dave Erlanson, Sr.

cc: Public Lands for the People, Inc.
Rocky Mountain Mining Rights
Idaho Dept. of Environmental Quality

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101-3140

JAN 22 2016

OFFICE OF
COMPLIANCE AND ENFORCEMENT

Reply To: OCE-101

Certified Mail – Return Receipt Requested

NOTICE OF VIOLATION – REQUEST FOR INFORMATION

Mr. Dave Erlanson, Sr.
P.O. Box 46
Swan Valley, Idaho 83449

Re: Suction Dredge in South Fork Clearwater River

Dear Mr. Erlanson:

Wall Void

This letter concerns an alleged violation of the Clean Water Act, 33 U.S.C. § 1251 et seq., for the discharge of pollutants from a suction dredge owned and/or controlled by you in the South Fork Clearwater River, near Elk City, Idaho, without authorization under a National Pollutant Discharge Elimination System (NPDES) Permit. By this letter, the U.S. Environmental Protection Agency (EPA) is providing you with notice of the alleged violation of the Clean Water Act and requesting additional information regarding those activities.

The EPA received information that you were operating your suction dredge on July 22, 2015, in the South Fork Clearwater River, near Mile Marker 39 Highway 14. The South Fork Clearwater River is a water of the United States. Additionally, this section of the South Fork Clearwater River is listed as critical habitat for threatened species including bull trout, Chinook salmon, and steelhead trout, and is also listed as a Clean Water Act Section 303(d)-impaired water for sediment and temperature.

Pursuant to Section 301 of the Clean Water Act, 33 U.S.C. § 1311, an individual must obtain a Clean Water Act Section 402 NPDES Permit to discharge pollutants, such as rock and sand from a suction dredge, into a water of the United States. The EPA issued an NPDES General Permit in 2013 for small suction dredge operations in Idaho. However, Part I.D.4 of the General Permit prohibits discharges from suction dredges in habitat designated as critical habitat under the Endangered Species Act (ESA) unless an ESA determination has been made through another process, such as a U.S. Forest Service Plan of Operations (discussed in more detail below), and the decision is provided with the Notice of Intent for coverage under the Permit. Our records indicate that the EPA informed you of this requirement by letter dated October 3, 2014; the return receipt was signed by you on October 8, 2014.

A Plan of Operations is required by the U.S. Forest Service to suction dredge along streams that contain threatened or endangered species within the Nez Perce-Clearwater National Forest. Before approving such Plans of Operations, the U.S. Forest Service must first consult with the U.S. Fish and Wildlife Service and National Marine Fisheries Service, to ensure that effects of actions they authorize are not likely to jeopardize the continued existence of threatened or endangered species. In March of 2015, the Nez Perce-Clearwater National Forest announced that they were initiating a combined environmental analysis for small-scale placer

(b) (6)

the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Failure to provide all the information requested, the failure to adequately explain the basis for such failure, or the making of any false material statement or representation in response to this Request for Information constitutes a violation of Section 308 of the Clean Water Act, 33 U.S.C. § 1318, and may result in an enforcement action and the imposition of civil and/or criminal penalties or fines pursuant to Section 309 of the Clean Water Act, 33 U.S.C. § 1319, and Title 18 of the United States Code, 18 U.S.C. § 1001.

Although the information requested must be submitted to the EPA, you are entitled to assert a business confidentiality claim pursuant to the regulations set forth in 40 C.F.R. Part 2, Subpart B. If the EPA determines the information you have designated meets the criteria in 40 C.F.R. § 2.208, the information will be disclosed only to the extent and by means of the procedures specified in Subpart B. Unless a confidentiality claim is asserted at the time the requested information is submitted, the EPA may make the information available to the public without further notice to you.

If you have any questions regarding this letter or other matters related to your compliance with environmental laws, please contact Tara Martich, Compliance Officer, at (907) 271-6323. If you have any legal questions, please contact Endre Szalay, Assistant Regional Counsel, at (206) 553-1073.

Sincerely,

Edward J. Kowalski
Director

cc: Mr. John Cardwell
Idaho Department of Environmental Quality